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71-1599

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, A VOLUNTARY ASSOCIATION, AND DONALD PAULL AND RUTH NEDELSKY,

Petitioners,

vs.

MILTON B. BYRD, ROBERT L. RANDOLPH, IRWIN J. SULOWAY, CARL A. CLARK, AND BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, A BODY CORPORATE AND POLITIC OF THE STATE OF ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GILBERT A. CORNFIELD,
KLEIMAN, CORNFIELD and FELDMAN,
10 South LaSalle Street,
Suite 452,
Chicago, Illinois 60603,
Attorneys for Petitioners.

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INDEX

	PAGE
Table of Cases	ii
Statutes and Constitutional Provisions	iii
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	4
Statement of Case	5
How Federal Questions Were Presented	12
Reasons for Granting the Writ	13
1. An Inordinate Burden of Obtaining Due Process Was Placed on the Plaintiffs	14
2. Juxtaposition of Burden of Proof	16
3. Right of the Union to Join as a Plaintiff in Order to Seek General Declaratory Judgment and Injunctive Relief	17
Conclusion	19
Appendix A (Opinion of the United States Court of Appeals for the Seventh Circuit, Dated March 9, 1972, No. 18967)	A1

TABLE OF CASES.

Adams v. City of Park Ridge, 293 F. 2d 585 (C. A. 7, 1961) 18

American Federation of State, County and Municipal Employees v. Woodward, 406 F. 2d 137 (C. A. 8, 1969) 18

Auerbach v. Trustees of the California State Colleges, 330 F. Supp. 808 (U. S. D. C., Cen. Cal., 1971) 14

California Department of Human Resources v. Java, 402 U. S. 121 (1971) 16

Fooden, et al. v. Board of Governors of State Colleges and Universities of Illinois, ... Ill. ..... (Case No. 42460), cert. filed and pending in Supreme Court of the United States, October Term, 1970, Case No. 70-354 16

Goldberg v. Kelly, 397 U. S. 254 (1970) 16

Gouge v. Joint School District No. 1, 310 F. Supp. 984 (W. D. Wis., 1970) 14

Knox v. First National Bank of Utah, 196 F. 2d 112 (C. A. 8, 1952) 19

Lucia v. Duggan, 303 F. Supp. 118 (D. C. Mass., 1969). 14

NAACP and NAACP, Inc. v. Patty, 159 F. Supp. 503 (E. D. Va., 1958) 18

Olson v. University of Minnesota Regents, 301 F. Supp. 1356 (D. C. Minn., 1969) 14

Orr v. Thorpe, 427 F. 2d 1129 (C. A. 5, 1970) 18

Perry v. Sindermann, 403 F. 2d 939 (C. A. 5, 1970), cert. granted 403 U. S. 917 ..... 13, 15

Pfister v. Arcaneaux, 376 F. 2d 871 (C. A. 5, 1966), cert. den'd 389 U. S. 987 19

Roth v. Board of Regents, 446 F. 2d 806 (C. A. 7, 1971), cert. granted 92 S. Ct. 227 14

Sherbert v. Verner, 374 U. S. 398 (1963) 16

Thorpe v. Housing Authority City of Durham, 393 U. S. 268 (1969) 16

STATUTORY AND CONSTITUTIONAL PROVISIONS.

United States Constitution, Amendment First 3, 4

United States Constitution, Amendment Fourteen ... 2, 3, 4

United States Civil Rights Act Title 42 U. S. C. § 1983 ..... 2, 3, 5, 12, 18

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioners Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO, a voluntary association, and Donald Paull and Ruth Nedelsky, hereby respectfully pray that a writ for certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 9, 1972, and thereby affirming the judgment entered by the United States District Court for the Northern District of Illinois, entered on November 5, 1970.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not as yet reported. The docket number for the case is 18967.

JURISDICTION.

This Court's jurisdiction is invoked under Title 28 U. S. C. § 1254.

QUESTION PRESENTED.

1. Whether the Fourteenth Amendment of the Constitution of the United States and the United States Civil Rights Act Title 42 U. S. C. § 1983 guarantees of due process and equal protection of the laws applies to faculty members of a public institution of higher education so as to assure that such employees cannot be severed from employment prior to their being afforded a specific statement of reasons for their termination from employment by the employing authority and a reasonable opportunity to be heard in response thereto before an impartial reveiwing authority of the employer.

2. Whether the aforesaid rights of due process and equal protection are rendered moot upon the United States District Court failing and refusing to afford such rights to faculty members of a public institution of higher education prior to their effective termination from employment at such institution, and the Court, subsequent to such determinations, taking upon itself the determination of whether the decision of the public employer to so terminate was "clearly erroneous".

3. Whether the Petitioners, as Plaintiffs, are entitled to a declaratory judgment and appropriate injunctive relief restraining a public institution of higher education from continuing to enforce its admitted policy of refusing to

provide specific statements of reasons and impartial hearings, as set forth above, for non-tenured faculty members who are refused by the public employer renewal of their employment contracts for the next academic year. Ancillary to that question is whether the Court can abort its responsibility for issuing a declaratory judgment and an appropriate injunctive relief by dismissing as a party, a plaintiff association of teacher members who were joined as a party plaintiff on behalf of a class of its members at the public institution of higher education and all other faculty at said institution.

4. Whether the United States District Court and the United States Court of Appeals for the Seventh Circuit was in error in upholding the right of a public institution of higher education to refuse the renewal of non-tenured teachers' employment contracts. Upon a finding by the United States District Court that said teachers in fact had engaged in protected activity under the First and Fourteenth Amendments to the Constitution of the United States and the United States Civil Rights Act, Title 42 U. S. C. § 1983 by:

(a) open support of their Teachers Union's efforts to establish collective bargaining at said institution;

(b) their expressed opinions of racism in public education;

(c) their expressed opinions on the use of massive intervention of city police on the campus of said institutions during a "strike" by black students at said institution; and

(d) their expressed opinions in opposition to the election of an incumbent as a Department Chairman,

(e) in the case of one of the faculty members, the institution of an investigation by his professional asso-

> ciation, Illinois Psychological Association, concerning the possible misuse and disclosure of student I.Q. test scores by the Chicago Board of Education,

but the said terminations were justified because the individual faculty members could not sustain a burden of proof that the decision to terminate their employment was based solely on such protected activities. Ancillary to this question is whether the decision of the United States District Court and the United States Court of Appeals was in error in the face of the proven fact that both faculty members had been recommended for contract renewal by the recognized reviewing body of the faculty and that prior to engaging in said activities both faculty members had been repeatedly recommended for contract renewal and tenure.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional and statutory provisions applicable to this case are set forth as follows:

The United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The United States Constitution, Amendment XIV, provides, in pertinent part, as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Civil Rights Act Title 42 U. S. C. 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF CASE.

This suit was commenced by the Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO (hereinafter referred to as the "Union"), a voluntary association including members of the full-time faculty at Chicago State College, a public institution of higher education.

The Complaint alleges, and was not denied, that the Union and its parent organization, the American Federation of Teachers, exist in part for the purpose of representing academic employees in institutions of higher learning in connection with their working conditions. Joined with the Union as Plaintiffs were two non-tenured faculty members of Chicago State College, Donald Paull and Ruth Nedelsky. The Defendants were the principal administrative officers of Chicago State College, and, in addition, the Chairman of the Psychology Department of said institution in which Nedelsky and Paull had been employed. Also named as Defendant was the Board of Governors of State

Colleges and Universities of Illinois, a public body appointed by the Governor of the State of Illinois with governing authority over Chicago State College and other similar institutions in Illinois.

The suit was filed on May 8, 1972, during the 1969-1970 academic year of the Chicago State College. The Complaint alleged that the individual Plaintiffs had been notified by the administrative officers of Chicago State College that their contracts would not be renewed for the 1970-1971 academic year and that their employment would be effectively terminated at the end of the current academic year. At the time the suit was commenced, the Defendant Board had not as yet acted upon the decision of the administrative officers of the institution to terminate the two professors. However, the Complaint set out that the individual Plaintiffs and the Plaintiff Union had repeatedly requested during the current academic year since November, 1969, a specific statement of reasons as to why said faculty members were not recommended for retention from the Administration of the College and the College Board. The Complaint also alleged that although such request had been repeatedly advanced, all the Defendants had failed and refused to comply with said request. The Complaint further alleged that the refusal to afford the individual Plaintiffs a specific statement of reasons for their severance from employment was consistent with the policies and practices pursued by the Defendants in connection with the non-renewal of non-tenured teacher contracts.

As an alternative basis for the action, the Complaint also alleged, on information and belief, that the individual Plaintiffs, in fact, were being terminated because of their open leadership on behalf of the Plaintiff Union in seeking collective bargaining for the full-time faculty members at Chicago State College; their proposals as educators to introduce as part of academic studies the subject matter of

"racism" as a factor in public education; their open opposition to the use of large scale city police intervention on the college campus during a recent period of potential racial tension among the black students attending the school; their support of Plaintiff Paull to be elected Chairman of the Psychology Department by the eligible faculty members of the Psychology Department at Chicago State College; and Plaintiff Paull's initiative in seeking a confidential investigation by his professional association, the Illinois Psychological Association, of the possible misuse of student I. Q. test results by staff members of the Chicago Board of Education.

Plaintiff Union was identified in the Complaint as a party in interest representing a class of members employed at Chicago State College and all other full-time faculty at the college.

The Complaint sought:

1. The individual Plaintiffs be retained as faculty members for the forthcoming 1970-71 academic year until such time as the public employer afforded them rights of due process prior to the effective date of their termination;

2. A declaratory judgment and appropriate injunctive relief governing the practices and policies of the Governing Board and administrative officers of the College in affording rights of due process for non-tenured faculty members prior to the effective date of their termination from employment in cases where said faculty members are not granted contract renewals for the forthcoming academic year;

3. That the Court award damages or other forms of equitable relief as it deemed necessary.

Following the filing of suit, the Defendant Board formally terminated the individual Plaintiffs from continued employment after the current academic year without affording them a statement of reasons or an opportunity to be heard before said Board.

Within three weeks of the filing of suit and still within the 1969-70 academic year, the Plaintiff sought temporary injunctive relief allowing the two professors to continue teaching at the college during the forthcoming 1970-71 academic year, citing the continuous failure and refusal of the Defendants to afford the Plaintiffs any reasons for their termination and the failure of the Defendant Board to act on their requested contract renewals until May, 1970. The motion for injunction cited the fact that the individual Plaintiffs had been unable to obtain alternative academic positions for the forthcoming academic year and the obvious immediate and long-range irreparable harm they would suffer.

In response to the Plaintiffs' motion for temporary injunctive relief, all of the Defendants filed a verified Answer to the Complaint admitting that the individual Plaintiffs had not been given specific reasons for their termination from employment and that such action by the Defendants was consistent with the general policies and practices of the administration of the college. The Defendants further denied that the Plaintiffs had been removed from their position for the reasons set forth on information and belief in the Complaint. The Answer also denied the right of the Plaintiff Union to bring a class action. The Plaintiffs then attempted to expedite hearing and determination of the litigation by filing a Motion for Summary Judgment based upon the verified admissions of the Defendants that the individual Plaintiffs had not and would not be afforded due process prior to their termination from employment at the college. From June, 1970 throughout that summer and into September, 1970, the Plaintiffs repeatedly and unsuccessfully sought a hearing and determination of their Motion for Summary Judgment from the United States District Court. In August, 1970, on its own motion, the Court resurrected Plaintiffs' initial Motion for Temporary Injunction and

dismissed Plaintiff Union as a party without any form of evidentiary hearing on the basis that, as a matter of law and pleading, it did not represent any class with a justiciable interest.

In September, 1970, the Court conducted an evidentiary hearing on Plaintiffs' original Motion for Temporary Injunction and on November 5, 1970, the Court issued Findings of Fact and Conclusions of law, determining that the Plaintiffs had not proven that they had been terminated because of the protected activity set forth in the Complaint and that the issue of due process had been rendered moot by virtue of the Court's evidentiary hearing pursuant to the Motion for Temporary Injunction. The Court did not address itself to the Plaintiffs' general request for declaratory judgment and appropriate injunctive relief over the admitted practices and procedures followed by the administration and governing board of the college in respect to the non-renewal of non-tenured teacher contracts.

The District Court found that, in fact, the individual Plaintiffs had engaged in the activity set forth in the Complaint as allegedly protected by the First and Fourteenth Amendments to the Constitution of the United States and the United States Civil Rights Act. Furthermore, the evidence sustained the fact that prior to the time Plaintiffs had engaged in such activity, they had been repeatedly recommended for contract renewal in the institution by an appropriate faculty committee and administrative officers. The evidence further substantiated that prior to the time that Plaintiffs had engaged in such activity they had been recommended for tenure by appropriate faculty bodies.

The evidence further substantiated that it was unprecedented for the college administration to deny contract renewals in the face of recommendations by the majority members of appropriate faculty committee, except in the case of two individual Plaintiffs and to other non-tenured

Union leaders in the year before Paull and Nedelsky were terminated.

At the evidentiary hearing on Plaintiffs' Motion for Temporary Injunction, administrative officers of the Defendant Board expressed reasons as to why the individual Plaintiffs' contracts were not renewed. These reasons had never before been expressed to the Plaintiffs nor had they ever been reduced to writing. Except for the reference to Plaintiff Paull's letter to the Illinois Psychological Association, there was no evidence that reasons advanced for the first time before the Court had been communicated to the faculty committee that had recommended by majority vote the retention of Paull and Nedelsky. In the District Court's Findings of Fact there is no reference as to why the individual Plaintiffs had been terminated from employment except the Court referred to Plaintiff Paull's letter to the Illinois Psychological Association. However, the District Court found that Paull's sending of that letter was not a reason for his dismissal. The Court did specifically find that the individual Plaintiffs had engaged in each and every item of activity alleged in the Complaint as within the scope of protection under the First and Fourteenth Amendments of the Constitution of the United States and the United State Civil Rights Act, and the governing rules and policies of the institution. The Court concluded, however, that the Plaintiffs had failed to meet a burden of proof that they had, in fact, been terminated for such activity. In its Conclusions of Law, the District Court denied Plaintiffs' long standing Motion for Summary Judgment as being moot.

In affirming the District Court's decision, the Court of Appeals held:

1. The Court was correct in dismissing Plaintiff Union because it did not represent an appropriate class. The Court appeared to conclude that the Union could not be

joined as a Plaintiff because there were other members of the faculty at Chicago State College that may be antagonistic to the position taken by the Union. The Court of Appeals made no reference to the fact as alleged in the Complaint that the Union sought status as a Plaintiff for the members of the Union as well as all other faculty members. Neither the District Court nor the Court of Appeals addressed themselves to the standing of the Union to bring suit solely for its members at Chicago State College. The Court of Appeals further concluded that inasmuch as the Union had no standing to be Plaintiff, there was no need for either the District Court nor the Court of Appeals to address itself to the Plaintiffs' request for declaratory judgment and injunctive relief.

2. The Court of Appeals reviewed various excerpts of testimony of Defendant witnesses during the course of the hearing on the requested temporary injunction, although none of this testimony was specifically referred to by the United States District Court in its Findings of Fact and Conclusions of Law. The Court of Appeals noted by footnote the specific Findings of Fact by the District Court that the individual Plaintiffs had, in fact, engaged in the alleged protected activity prior to the time that they were terminated by the institution. As did the District Court, the Court of Appeals made no findings as to why, in fact, the Plaintiffs were dismissed, but adopted the criteria that the Plaintiffs bore the burden of proof and that the decision to dismiss was not clearly erroneous. In its review of some of the testimony, the Court of Appeals does not find that any of the alleged reasons for dismissal of the Plaintiffs had ever been communicated to them in any form prior to the Court hearing or whether in fact they were true. The Court of Appeals simply accepted the District Court's general conclusion that Defendants acted in good faith.

3. It is important to note that the Court of Appeals made specific reference to the reasons advanced by Defendant Clark, the incumbent Chairman of the Psychology Department, who had initially recommended that Paull and Nedelsky not be renewed in the face of a positive recommendation by a majority of the eligible members of the department. The Court of Appeals made reference to Clark's testimony that the retention of Paull and Nedelsky would not be consistent with achieving the goal of a "harmonious" department. The Court of Appeals failed to note that the only direct admitted evidence by Clark of Paull's and Nedelsky's unharmonious effect upon the department was their open advocacy of the election of a new Department Chairman as provided by the governing rules of the department and college. The Defendants admitted at the hearing that Paull and Nedelsky had a legal right as non-tenured faculty members to support and run for election of a new department chairman without fear of being denied a contract renewal. The extensive references by the Court of Appeals to the testimony of Defendant Byrd, President of the College, do not reflect the fact that such statements were hearsay by President Byrd, and never made in the presence of the Plaintiffs prior to the Court hearing.

HOW FEDERAL QUESTIONS WERE PRESENTED.

The Complaint filed herein specifically alleged the procedures followed for effecting the removal of the individual Plaintiffs and other non-tenured faculty at Chicago State College was and is violative of the First and Fourteenth Amendments to the Constitution of the United States and the United States Civil Rights Act, Title 42 U. S. C. § 1983.

REASONS FOR GRANTING THE WRIT.

The central issue raised by this Petition has been heard and is awaiting decision by the Supreme Court of the United States in *Perry* v. *Sindermann*, 430 F. 2d 939 (C. A. 5, 1970), cert. granted, 403 U. S. 917. The question certified in *Perry* v. *Sindermann* was:

> "Does teacher without tenure and with no expectancy of having his contract renewed have any constitutionally protected right to continued employment?"

As in *Perry* v. *Sindermann* and companion cases, the individual plaintiffs in the subject litigation were terminated from their employment following extensive leadership activity on the part of their association and engaging in other acts protected under the Equal Protection provisions of the 14th Amendment and the United States Civil Rights Act. Assuming that the Supreme Court of the United States decides the basic due process issue raised in *Percy* v. *Sindermann* in favor of the teacher plaintiff, then the subject case raises an important related issue.

In effect, the District Court and the Court of Appeals have held that if, in fact, there are due process guarantees for non-tenured faculty members in the case of non-renewal of their employment contracts, then these guarantees are satisfied if a United States District Court holds a evidentiary hearing months after the teachers have been terminated from gainful employment. *If Perry* v. *Sindermann* is decided in favor of the teacher, but yet the Court of Appeals decision in the subject case is allowed to stand without review by the Supreme Court, then the effect of *Perry* v. *Sindermann* in the 7th Circuit remains confused, if not vitiated. Because of the failure of the District Court to act decisively on the Plaintiffs' Motions for Temporary Injunction and then Summary Judgment in the subject litigation, the following effects ensued:

1. An Inordinate Burden of Obtaining Due Process Was Placed Upon the Plaintiffs.

The Plaintiffs were not afforded due process rights within their public institution of higher education and among their peers before they were dismissed from professional, gainful employment and thereby were required to expend considerable time and costs in pursuing litigation in the United States District Court. If the Courts and public administrators can assume that this practice is tolerable, then as a practical matter, public teachers are burdened with heavy costs in order to secure the constitutional rights of due process. In *Roth* v. *Board of Regents*, 446 F. 2d 806 (C. A., 7, 1971), cert. granted 925 Ct. 227, the Court of Appeals, in holding that a non-tenured public teacher had the right to be confronted with the reasons and an opportunity to be heard before termination from employment, emphasized the significance that these rights be recognized prior to the time that the teacher ceases employment:

> The contest on this appeal is whether the state university, in deciding not to retain a non-tenured professor, must initially shoulder the burden of exposing to the limited test ordered by the district court the reasons on which its decision is predicated, and to that extent demonstrate that its reasons are not impermissible, or whether the first recourse of the professor is to attempt to establish in the judicial forum that the reasons are impermissible." 446 F. 2d 808.

In accord: *Auerbach* v. *Trustees of The California State Colleges*, 330 F. Supp. 808 (U. S. D. C., Cen. Cal., 1971); *Lucia* v. *Duggan*, 303 F. Supp. 118 (D. C. Mass., 1969); *Gouge* v. *Joint School District No. 1*, 310 F. Supp. 984 (W. D. Wis., 1970).

We underscore for the Court's attention the decision in *Olson* v. *University of Minnesota Regents*, 301 F. Supp.

1356 (D. C. Minn., 1969), requiring that a specific statement of reasons and opportunity to be heard be afforded a civil service employee prior to his effective date of termination from employment even though the employee had the right to a formal civil service hearing and administrative review after his suspension from employment.

We believe that it is important for the Supreme Court of the United States to clarify whether the constitutional rights of due process and equal protection for public teachers and other public employees must be afforded upon request prior to the time that an employee ceases gainful employment. This question is particularly important to teachers in public institutions. The Supreme Court is undoubtedly aware that in most situations, teachers and professors are hired by academic years beginning in the fall and ending in the spring. It is a general matter of custom and practice that hiring for a forthcoming academic year is generally completed by the previous spring. The individual plaintiffs involved in this case were not only denied rights of due process before they were terminated at the end of the 1969-1970 academic year, but because their status was still in doubt as of spring, 1970, and it was generally understood in the academic community within the Chicago area that they were being "fired", their professional status and employment opportunities were severely hampered by the delay caused through effectively requiring them to pursue the judicial process after their termination from employment as the initial forum for seeking their rights of due process. The *Perry* v. *Sindermann* line in cases follows recent decisions of the Supreme Court of the United States in holding that it is fundamental to due process that persons be not denied benefits or property rights *before* they are provided procedures for review by the governmental agency or institution that intends to deprive them of such benefits or

rights. The Supreme Court has recognized that constitutional guarantees of due process are effectively weakened if the burden is placed upon the person seeking such rights to be afforded the right *after* he has been deprived of the benefit. This fundamental requirement of due process is not only designed to effectively secure the rights of the individual affected in the particular case but to act as a deterrent to public agencies and authorities in future situations. If an individual is made to believe that he can obtain a specific statement of reasons and right to be heard only after he has been severed from the public payroll or benefit, then he will seriously consider whether he should chance the exercise of protected activities of free speech and assembly in the form of criticism of the public institution or agency. We submit that that concept is inherent in the Supreme Court decisions holding rights of due process prior to the termination of benefits for welfare recipients in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); for public housing tenants in *Thorpe* v. *Housing Authority City of Durham*, 393 U. S. 268 (1969), and withholding of unemployment benefits, *California Department of Human Resources Development* v. *Java*, 402 U. S. 121 (1971) and *Sherbert* v. *Verner*, 374 U. S. 398 (1963).

2. Juxtaposition of Burden of Proof.

As we have noted earlier, the District Court decision in the subject case makes no specific findings of fact as to why the individual plaintiffs were terminated from employment, even though their termination was admittedly unprecedented except for the dismissal of 2 other non-tenured teachers who were leaders of the plaintiff organization. See *Fooden, et al.* v. *Board of Governors of State Colleges and Universities of Illinois*, ... Ill. ..... (case No. 42460), cert. filed and pending in the Supreme Court of the United States since October Term, 1970 (Case No. 70-354), how-

ever, both the District Court and the Court of Appeals placed the burden of proof upon the individual teachers in the proceedings to prove that they were terminated for their protected activity. The Court of Appeals then applied the "clearly erroneous" standard in reviewing the District Court's decision. This form of proceeding is quite different that the standards of due process set forth in the above cited decisions of the Supreme Court of the United States and other federal courts. If the administration had followed the requirements of due process prior to the dismissal of the two professors, then the professors would have first been afforded a specific statement of reasons for their dismissals in forms which could be viewed and evaluated by their peers and could have responded to those reasons before they were dismissed. It is quite likely, in fact, that had this procedure been imposed upon the administration that these faculty members would never have been terminated within this academic community in the face of majority recommendations from the tenured members of their department.

3. Right of the Union to Join as a Plaintiff in Order to Seek General Declaratory Judgment and Injunctive Relief.

Attendant to the issues of due process and equal protection is the District Court's decision to dismiss the Plaintiff Union as a party and thereby avoid a decision as to whether the College's admitted policy of not providing due process procedures prior to termination of non-tenured faculty members was lawful. We submit that it is very crucial that the Supreme Court of the United States determine the status of an association of public employees to seek general declaratory judgment and injunctive relief from federal courts in relationship to the rights of the members to freely participate in the organization and to

secure due process if threatened with termination from employment. Both the District Court and the Court of Appeals held that as a matter of law the Plaintiff Union did not have such a right, even though Plaintiff Union specified that it was joined as a party both for its members and the general full-time faculty at the College. If the District Court and the Court of Appeals ruled as a matter of law that the Union could not represent the entire faculty, we believe that there is a serious question of the right of the District Court and the Court of Appeals to also rule as a matter of law that the Plainiff Union had no right to represent its members in this litigation. In this regard, the Court of Appeals decision raises serious variance with earlier contrary holdings. In *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (C. A. 7, 1961), the Court of Appeals for the Seventh Circuit affirmed the right of members of a not-for-profit corporation to sue for declaratory judgment and injunctive relief against municipal authorities under the United States Civil Rights Act in connection with the City's alleged effort to restrict the members and the association's rights to engage in various activities. In *Orr* v. *Thorpe*, 427 F. 2d 1129 (C. A. 5, 1970), the United States Court of Appeals for the Fifth Circuit sustained the right of a teachers association to bring suit under Title 42, U. S. C., Section 1983, against members of a public school board over various acts by the school board which the association alleged had the effect of detering participation by the teachers in the organization. To the same effect is the decision of the United States Court of Appeals for the Eighth Circuit in *American Federation of State, County and Municipal Employees* v. *Woodward*, 406 F. 2d 137 (C. A. 8, 1969). In accord also: *NAACP and NAACP, Inc. Fund* v. *Patty*, 159 F. Supp. 503 (E. D. Va., 1958). In considering the certification of this issue, we request that the Supreme Court bear in mind that the Defendants' Motion

to Dismiss the Plaintiff Union as a class was not raised until months after the litigation had been pending (see: *Pfister* v. *Arcaneaux*, 376 F. 2d 871 (C. A. 5, 1966), cert. den'd 389 U. S. 987) and was not ruled upon after the taking of evidence. *Knox* v. *First National Bank of Utah*, 196 F. 2d 112 (C. A. 8, 1952).

CONCLUSION.

The need to resolve the issue of whether public employees are protected by due process guarantees *prior* to their termination from employment is crucial. Furthermore, we believe it essential that the Supreme Court determine and establish guidelines for the right of an association of public employees to seek review by the federal courts of procedures and policies pursued by a public employer, which the association contents are contrary to constitutional rights of free speech, assembly, equal protection and due process for its members and other employees at the institution. Foreclosing the right of such organizations to seek relief through the imposition of technical rules of pleadings encourages piecemeal litigation and creates uncertainty on the part of public employees as to their rights. We urge the Court to grant our Petition.

Respectfully submitted,

GILBERT A. CORNFIELD,
KLEIMAN, CORNFIELD and FELDMAN,
10 South LaSalle Street,
Suite 452,
Chicago, Illinois 60603,
Attorneys for Petitioners.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

No. 18967

COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, a voluntary association, and DONALD PAULL and RUTH NEDELSKY,
Plaintiffs-Appellants,

v.

MILTON B. BYRD, ROBERT L. RANDOLPH, IRWIN J. SULOWAY, CARL A. CLARK, and BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, a body corporate and politic of the State of Illinois,
Defendants-Appellees.

On Appeal from the United States District Court, Northern District of Illinois, Eastern Division.

No. 70 C 1086

RICHARD B. AUSTIN,
Judge.

March 9, 1972

Before FAIRCHILD, PELL and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from a judgment in a suit brought pursuant to 42 U. S. C. § 1983, concerning the nonrenewal of the teaching contracts of the two indi-

vidual plaintiffs, Donald Paull and Ruth Nedelsky, formerly probationary faculty members at Chicago State College. The Cook County College Teachers Union, Local 1600, American Federation of Teachers, AFL-CIO (Union) joined in the action, purportedly on behalf of all the College's faculty. The defendants are officials at the College and the Board of Governors of State Colleges and Universities of Illinois, which by statute operates the College.

The amended complaint alleged that the defendants in denying Paull and Nedelsky teaching contracts for the 1970-71 academic year had violated their civil rights, their constitutional rights guaranteed by the first and fourteenth amendments, and "ancillary" guarantees of academic freedom incorporated into their teaching contracts. The complaint sought a declaration of the rights of the parties, injunctive relief and money damages.

More particularly, Paull and Nedelsky claimed that the defendants' failure to provide them with statements of the reasons for the nonrenewals violated their rights to procedural due process. In their briefs, but not in their complaint, they contend that they were also entitled to a hearing prior to their termination to respond to the reasons for the nonrenewal. The defendants allegedly violated the teachers' substantive constitutional rights by refusing to offer them contracts in retaliation for their union activities, their opposition to defendant Clark's reappointment to the chairmanship of the Department of Psychology, their public positions on racism in educational institutions and their opposition to the use of city police on the College's campus. In addition, plaintiff Paull alleged that he was not retained because of a letter he had written to the Illinois Psychological Association charging ethical violations in the use of student I. Q. scores by personnel employed by the Chicago Board of Education.

The defendants in their answer to the amended complaint denied, *inter alia,* that the Union was a proper class representative and admitted that the defendants had not told Paull and Nedelsky the reasons for the nonrenewal of their contracts.

In May 1970, the plaintiffs moved for a preliminary injunction allowing the terminated instructors to teach during the 1970-71 academic year pending a decision by the court whether their due process rights had been violated. Before the scheduled hearing on that motion, however, the plaintiffs moved for summary judgment on their claim that Paull and Nedelsky had been denied procedural due process. The district court then took the summary judgment motion under advisement and, *sua sponte*, struck from the call the hearing on the motion for preliminary injunction. In August 1970, the plaintiffs renewed their motion for preliminary injunction. On September 9, 1970, the district court scheduled a hearing on the motion for preliminary injunction. He also granted the defendants' motion to dismiss the class action and to strike the Union as a party plaintiff.

The parties stipulated that the record in the hearing on the motion for preliminary injunction would serve for disposition of the action on the merits. For four and one half days, the district court heard testimony and arguments about the procedures followed by the defendants in deciding not to renew the plaintiffs' contracts and the reasons for those decisions.

The court then found for the defendants, holding that the defendants had not acted on the basis of the constitutionally improper reasons alleged in the amended complaint. It further concluded that the defendants had decided not to renew Paull's and Nedelsky's contracts in good faith and for constitutionally permissible reasons *that were not wholly without basis in fact.* Because the defend-

ants at the hearing had explained the reasons for their decisions, the court held that no purpose would be served by returning the matter to the College for any further proceedings. Finally, the *court decided that the pending motion for summary judgment was moot,* denied the motion for preliminary injunction and dismissed the complaint.

The plaintiffs' appeal raises three issues; first, whether the district court erred in its determination that the action should not proceed as a class action; second, whether the district court clearly erred in finding that the defendants had acted in good faith and on the basis of constitutionally permissible reasons in deciding not to renew the plaintiffs' contracts; and third, whether, despite the holding of a full hearing in a federal district court on the reasons for the nonrenewals and the issuance of a judgment, the teachers were entitled to have their case referred back to the College for further proceedings.

I.

The Union sued "on behalf of its class of members at Chicago State College and all of the faculty at Chicago State College." It did not sue individually in its own behalf. Paull and Nedelsky did not sue on behalf of a class. In support of the class action, the Union merely alleged that the claims of illegal action and the relief sought were of common interest to all faculty members.

Because the Union was a movant for summary judgment and both sides had submitted memoranda on that matter, the defendants wished the court to consider the propriety of the class action prior to its ruling on the plaintiffs' motion. Hence, pursuant to Rule 23(c)(1) of the Fed. R. Civ. P., they filed a motion, accompanied by supporting affidavit and memorandum, to dismiss the class action and to dismiss the Union as a plaintiff. Rule 23(c)(1) states in part, "As soon as practicable after the commencement of

an action brought as a class action, the court shall determine by order whether it is to be so maintained." One opposing a class action may move for an order determining that the action may not be maintained as a class suit. 3B J. Moore, *Federal Practice* ¶ 23.50, at 23-1102 (2d ed. 1969).

The Union contends that the district court should have held an evidentiary hearing on whether the Union was a proper representative. It is true that in doubtful cases a court may decide that such a hearing is necessary. The court here received three lengthy memoranda from the parties on the disputed issue whether the Union's purported class action met the requirements of Rule 23 and Rule 23.2. We find that the court did not err in proceeding as it did.

Rule 23(a), as amended in 1966, lists four prerequisites for a class suit.[1] The burden was on the Union, the party seeking to utilize the class action, to establish its right to do so. *Philadelphia Electric Co.* v. *Anaconda Brass Co.*, 43 F. R. D. 452, 457 (E. D. Pa. 1968); 3B J. Moore, *Federal Practice* ¶ 23.02-2, at 23-156 (2d ed. 1969). It was obliged in its complaint to allege facts bringing the action within the appropriate requirements of the Rule. *Gibbeau* v. *City of Richmond*, 417 F. 2d 426, 342 (9th Cir. 1969).

We agree with the defendants' contention that none of the prerequisites of Rule 23(a) are satisfied. The members of the purported class would seem to have interests

1. Rule 23(a) provides:
"PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."
Even if an action meets the above four prerequisites, it must, of course, also fall within one of three subdivisions of Rule 23(b).

antagonistic to those of their fellow "members" and to the Union's. We find it particularly significant that the Union is not recognized as the collective bargaining agent for any of the faculty. Further, apparently only a minority of the College's teachers are members of the Union and both tenured and probationary professors belong to the Union. According to an affidavit of the dean of faculty, only nine probationary faculty members' contracts were not renewed for the 1970-71 academic year. Thus, the class of teachers that is arguably valid is not too large to have made joinder impracticable.

The Union points to the declaratory and injunctive relief sought in the complaint and argues that because the "relief requested relates to each faculty member's rights guaranteed under the Constitution . . . [i]t would be ludicrous to suggest that the right to make such statements or take such action is not a matter which affects all faculty." We can agree that the resolution of constitutional issues in a case "affects" many persons. Indeed, perhaps all citizens, not just the Chicago State faculty, are "affected" by the suit. That does not mean, however, that that is the appropriate criterion for the propriety of a class action. In neither their memorandum nor their briefs do the plaintiffs cite persuasive authority to support their arguments that the class action is maintainable and the Union a proper plaintiff. The requisites of the Federal Rules of Civil Procedure must be met but supportive facts were not brought to the court's attention.

We agree with the district court's determination that the Union's class action cannot be maintained and that the Union should be dismissed as a plaintiff.

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2. The Union argued that it also qualified under Rule 23.2 of the Federal Rules of Civil Procedure. For the reasons set forth in the text, we find that the Union's reliance on Rule 23.2 is misplaced.

II.

On the merits, the district court found that the defendants did not renew Paull's and Nedelsky's contracts for proper reasons and not the unlawful reasons asserted by the plaintiffs in their amended complaint.

The decision-making process at the College had operated as follows. The Board of Governors had delegated, subject to its review, the responsibility for personnel decisions to the president of the College (defendant Byrd), who, in turn, had primarily delegated his responsibility to the dean of faculty (defendant Suloway). The executive vice-president of the College (defendant Randolph) had reviewed the decision of the dean of faculty. The administrators had relied in part on the recommendation of the appropriate departmental chairman (in this case, defendant Clark of the psychology department). Although the tenured members of a department had voted on retention and tenure questions, their vote was advisory only, and the department chairman was required to make an independent evaluation as to whether a probationary faculty member's contract should be renewed. Thus, for the resolution of this case, the reasons of defendants Clark, Suloway, Randolph, and Byrd for their determinations about Paull and Nedelsky are crucial evidence.

The four individual defendants, all of whom appeared as witnesses, denied that retaliation for the plaintiffs' activities[3] was the basis for the nonrenewals and asserted that

3. Evidence presented at the hearing clearly showed that Paull and Nedelsky had engaged in the following activities: (1) open support of the Cook County College Teachers Union's unsuccessful efforts to establish itself as a bargaining representative at the College, including participation in the abortive April 1968 teachers' strike; (2) opposition in spring 1969 to the reselection of defendant Clark to the chairmanship of the psychology department and an attempt to have Paull, instead of Clark, receive the depart-

their judgments were unaffected by the plaintiffs' political and social beliefs. In addition to this denial each of these defendants testified as to the specific criteria or reasons he relied upon in making his recommendation.

Chairman Clark testified that evaluation of a teacher begins at the time of recruitment and occurs continuously thereafter. Clark had participated in the decision to hire Paull in the summer of 1967, but not in the decision to hire Nedelsky in 1965. He stated that in making his recommendations regarding the nonretention of the plaintiffs, he considered the following factors: (1) the assessments of the plaintiffs by other teachers in the department; (2) the plaintiffs' teaching ability; (3) their research work, including their interest in research and whether they gave professional papers; (4) the fulfillment of their obligations to the community; (5) their professional activities within the psychology department, including apparently how they interacted with their colleagues and with their students; and (6) the needs of the department and the College, not only at the present time but in the future too, because the College was undergoing expansion, and its needs were changing.

More particularly, Clark was concerned that the plaintiffs had received *the recommendation of the tenured members of the department by a sharply split vote.*[4] The close-

mental recommendation for the position; (3) vocal disapproval of the presence of city police on campus during the "strike" by the College's black students in spring 1969; (4) written and oral discussion, particularly by Nedelsky, on racism in public education; and (5) the sending of a letter on College stationery by Paull in August 1968 to the Illinois Psychological Association suggesting that employees of the Chicago Board of Education breached professional ethics in their use of student I. Q. scores.

4. The eleven member "APTS Committee" (Appointments, Promotions, Tenure and Salary) of the psychology department voted 6 to 5 in favor of Paull's retention. It voted either 6 to 5 or 6 to 4, with one member abstaining, in favor of Nedelsky's retention.

ness of this vote and certain personality traits of the plaintiffs, especially Paull, indicated that retention of the plaintiffs would not further Clark's goal of achieving a "harmonious" department. (Opposit. to Clark's dep't chair.)

Further, Clark was distressed that Nedelsky had not yet received her doctorate and that, even if she soon were awarded the Ph.D., it might not be in psychology. When questioned on cross-examination, Clark admitted that he had not checked with Nedelsky to confirm whether, in fact, her doctoral degree would not be in psychology. He emphasized, however, that the school would, in the near future, need highly qualified teachers expert in laboratory work. The school's needs allegedly were not in the areas in which Nedelsky taught. In response to the plaintiff's argument that retention for the 1970-71 academic year would not give Nedelsky or Paull tenure, Clark stressed that he felt it unfair to them to renew their contracts because of his "doubts" that they would ultimately receive tenure.[5]

The criteria that defendant Suloway, dean of faculty, testified he applied were similar to those of Clark. In addition, Suloway compared the plaintiffs' merits with the merits of those teachers "on board already, and with people with whom we have reason to believe we can employ to replace . . . [the teachers under discussion] in the event there is nonretention."

Suloway emphasized the important of a teacher's participating "constructively" in the activities of his depart-

5. Paull was in his third year at Chicago State when the decision was made that his contract would not be renewed for the next year. Nedelsky was in her fifth year. According to the bylaws of the Board of Governors, the decision whether tenure should be granted must be made no later than during the sixth year of a teacher's employment at the College. Dean Suloway testified that the College-wide "APST Committee" adjures departments to make their decision no later, whenever possible, than during a teacher's fifth year.

ment and in the operation of the College. One of the plaintiff's witnesses stated that Suloway had informed the departmental APTS Committee that he had found Paull to be "abrasive" and "uncooperative." Further Suloway had allegedly said that Paull's using College stationery for his letter to the Illinois Psychological Association was an "unsuitable action", a "manifestation of . . . [Paull's] mode of behavior." The dean had also told the APTS Committee that he felt Nedelsky was inflexible, particularly about agreeing to undertake activities that were not to her liking.

Defendant Clark testified that Suloway had also expressed concern whether Nedelsky had an adequate academic background in psychology. "He thought that we could do better."

Defendant Randolph assumed the executive vice-presidency of the College on July 1, 1969. He was not at the College at the time the events that plaintiffs alleged motivated the defendants to decide not to renew them occurred. He testified that he was unaware of the plaintiffs' activities prior to July 1969. The criteria that he claimed he had used in evaluating the plaintiffs were: (1) their academic preparation, the assessment of which involved a close reading of the plaintiff's complete records; (2) the recommendations from the dean of faculty; (3) the present state of the psychology department, its plans, and the demands that would be made of it in the future; and (4) the state of the academic marketplace.

In regard to Paull, Randolph particularly noticed his failure, in over 15 years since he received his Ph.D., to make a significant scholarly contribution in the field of psychology. He noted, too, that although Paull had taught at two other institutions, he had not been given tenure by them. Further, Paull was a clinical psychologist, and the College at that time did not offer a program in Paull's

specialty. Randolph was also influenced by the closeness of the vote by the psychology department's APTS Committee. In sum, Randolph felt that Paull's record lacked distinction and that the current academic marketplace offered better possibilities for the College.

In regard to Nedelsky, Randolph was "shocked" that she had ever been hired by the College. "[S]he had . . . not a single degree in the field in which she was teaching. . . ."

Defendant Byrd, president of the College, testified that he had not played any part in the decisions resulting in the notification to Paull and Nedelsky in November 1969 that they would not be retained for the next academic year. However, he did review the decisions as a member of the Executive Council of the College Senate,[6] which held two

President Byrd recalled that witnesses at those meetings offered the following evaluations of Paull: he operated his classes in such a way as to preclude investigation and expression of opinion by students; "there was a conclusion that he had a very undistinguished academic record and that the future would be more of the same"; he was abrasive, immature, uncooperative, and unable to accept decisions democratically arrived at by his colleagues—"he seemed to contribute to the intensification of what was already a polarized condition in the psychology department."

The comments about Nedelsky included: her teaching lacked intellectual content; she had "remarkably little background in her discipline"; she was abrasive, a polarizing influence in the department, and was unable to work

6. The seven member Executive Council consisted of two administrators (President Byrd as chairman and Dean Suloway, appointed by Byrd) and five teachers elected by the Senate from among the Senate's members. The plaintiffs claim that the five faculty members were "Department Chairmen appointed by the administration and [were] avowed and open anti-unionists."

meetings to review the Paull-Nedelsky matter.

with her colleagues; she was highly emotional and "unrealistic."

The discussions at the Council meetings led President Byrd to conclude that "there was an ample case made for the judgment of the Dean and the chairman." Voting by secret ballot, the Executive Council unanimously supported the administrative actions taken in regard to Paull and to Nedelsky.

We recognize that a justifiable ground of discharge is not a defense when that ground is a *mere pretext* and not the moving cause of the discharge. "Obviously, a non-retention decision based upon activity which is not constitutionally protected, is a valid decision. But a decision based in part on protected activity is not a valid decision." *Roth* v. *Board of Regents of State Colleges*, 310 F. Supp. 972, 981-82 (W. D. Wis. 1970); *aff'd*, 446 F. 2d 806 (7th Cir. 1971), *cert. granted*, 404 U. S. 909 (1971).

The plaintiffs' primary contentions are that the non-retentions really resulted from an anti-union bias on the part of the College administration and, in the case of Paull, also from retaliation for his writing the letter to the Illinois Psychological Association. The plaintiffs bore the burden of proof on these claims. The district court found, in effect, that the plaintiffs failed to satisfy their burden.[7]

We appreciate how difficult it sometimes is to determine whether the reasons given by school authorities for the dismissal of a teacher are the actual bases for their decision. This is so in part because, as the district court in *Roth*, *supra*, 310 F. Supp. at 978-79, 983, remarked:

7. We are unable to say that an activating factor in the letter matter was the content of the utterances which might have raised a question of constitutional protection. The use of official stationery for the expression of personal views appears to have been the critical factor. At least one defendant thought it was a further example of Paull's lack of judgment.

"[I]t is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who had not yet won sufficient respect from his colleagues. . . . [I]t is important that . . . the university should enjoy the widest possible latitude consistent with protection against arbitrariness and against invasion of . . . [the teacher's] First Amendment rights."

On this appeal, we are bound by the "clearly erroneous" test of Rule 52(a), Fed. R. Civ. P. We find that the district court's determination that the defendants did not act from the motives alleged by the plaintiffs is not "clearly erroneous." Upon review of the entire evidence, we are not "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

The plaintiffs also presented evidence concerning their academic credentials. Such evidence may well be appropriate in a case like this, but the plaintiffs on appeal seem really to be urging this court to act as an appellate college committee with authority to order school officials to retain a nontenured teacher if he meets criteria established by us or if he once was apparently regarded favorably by the College.[8] However, it is not our function to evaluate a professor's competence nor to determine whether he any longer

8. The plaintiffs apparently assume that a favorable recommendation by a teacher's peers or by the administration one year forecloses reexamination of the teacher's merits in subsequent years. Or, if a re-evaluation is made and that assessment is less favorable than the previous assessment, then prejudicial influences must have affected the later decision. Testimony revealed, however, that the faculty is constantly reevaluated. Indeed, tenured teachers as well as nontenured teachers are rated yearly. Salary increments depend on this rating.

We note that in the case of Nedelsky, although she had received the recommendation of her peers for the two years prior to the year in question, the vote in her favor decreased each year.

fits the needs of a school that is expanding its programs and attempting to upgrade the quality of its faculty. We may not so far involve this court in the discretionary decisions made by state-controlled colleges. *Cf.* Judge Kiley's statement in his concurrence in *Simcox* v. *Board of Ed. of Lockport Twp.*, 443 F. 2d 40, 46 (7th Cir. 1971): "The defendant board members are selected by the residents of the community, and the community will get the school system that the members it elects provide."

Under *Roth*, the decision not to retain a nontenured professor employed by a state university is to be measured against a standard "considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." *Roth, supra*, 310 F. Supp. at 979. More specifically, the appropriate standard for a district court to apply is that the decision "may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason." *Id.*

The district court judge found that the defendants had applied "customary criteria." Courts in this circuit as well as in other circuits have concluded that reasons such as those advanced by the defendants in the instant case are constitutionally permissible. See, *e.g.*, *Simcox* v. *Board of Ed. of Lockport Twp.*, 443 F. 2d 40 (7th Cir. 1971); *Knarr* v. *Board of School Trustees of Griffith, Ind.*, 452 F. 2d 649 (7th Cir. 1971); *Fluker* v. *Alabama State Bd. of Ed.*, 441 F. 2d 201 (5th Cir. 1971); *Robbins* v. *Board of Ed. of Argo Comm. H. S.*, 313 F. Supp. 642 (N. D. Ill. 1970); *Albaum* v. *Carey*, 310 F. Supp. 594 (E. D. N. Y. 1969).

The district court found that the "defendants were credible witnesses." The record as a whole supports the district court's determination that the actions of the College

administrators did not rest "on a basis wholly unsupported in fact, or . . . wholly without reason."[9]

III.

The district court conducted the hearing in this case in September 1970. This court decided *Roth, supra*, on July 1, 1971. In our opinion, the most sensible and economical course is that those cases, such as the present one, which were the subjects of full hearings in district courts before July 1, 1971, should not be sent back to the schools for further action. Evidentiary proceedings in the district courts in these pre-*Roth* situations sufficiently protect the rights granted public school teachers by *Roth*. *Cf. Jennings* v. *Mahoney*, 404 U. S. 25 (1971); *Fluker* v. *Alabama State Bd. of Ed.*, 441 F. 2d 201, 208 and n. 15 (5th Cir. 1971).

What we have said here, of course, would have no application to cases before district courts in the post-*Roth* (July 1, 1971) situation.

For the reasons hereinbefore set out, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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9. *Cf. Simcox* v. *Board of Ed. of Lockport Twp.*, 443 F. 2d 40, 42 (7th Cir. 1971), decided prior to our decision in *Roth*:

"Our only province, as respects the reasons given by the Board for plaintiff's dismissal, is to determine whether such reasons are so wanting in evidentiary support that it must be said that they are, in effect, a smoke screen hiding some undisclosed reason which was the real basis for defendants' action. . . ."

In the Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1599

COOK COUNTY COLLEGE TEACHERS UNION, LOCAL 1600, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, a voluntary association, and DONALD PAULL and RUTH NEDELSKY,

Petitioners,

vs.

MILTON B. BYRD, ROBERT L. RANDOLPH, IRWIN J. SULOWAY, CARL A. CLARK, and BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES OF ILLINOIS, a body corporate and politic of the State of Illinois,

Respondents.

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion below of the United States Court of Appeals for the Seventh Circuit is reported at 456 F.2d 882, and is reprinted, with certain typographical errors, in the appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-petitioners* were two college instructors at Chicago State College (College) suing individually and a union* suing only in a representative capacity on behalf of all faculty of the College. Defendants-respondents are administrators at the College (now Chicago State University) and the board which governs the College. Ill. Rev. Stat. 1971, ch. 144 §1001.

Petitioners were probationary instructors and had not yet achieved tenure. Under state law, their contracts and custom and practice at the College, petitioners had no right to continued employment beyond the expiration of their year-to-year teaching contracts. Respondents decided not to renew their teaching contracts beyond the academic year 1970-71.

Petitioners alleged that they were denied reemployment in retaliation for the exercise of speech and associational activities protected by the First Amendment to the United States Constitution. Respondents denied that any of petitioners' speech or associational activities influenced the decision not to reemploy them. Instead, respondents stated that they applied customary and constitutionally permissible criteria relating to petitioners' competence in making their decisions.

After hearing evidence for four days and oral argument for one-half day, the district court found that respondents did not act on the basis of petitioners' speech and associational activities in deciding not to reemploy them, but rather applied customary criteria relating to petitioners' competence as teachers. These reasons are set forth in

* As used herein, "petitioner" refers to the individual plaintiffs and "union" refers to the union plaintiff which sued as a class representative.

detail in the court of appeals' opinion. The court of appeals reviewed the record and determined that the district court's findings of fact were not clearly erroneous.

Petitioners also claimed that, even though they were probationary employees, they were entitled to a hearing upon request before respondents could decide not to renew their contracts. The district court did not reach this issue since the hearing before it, which was expedited at petitioners' request, satisfied any procedural due process rights which petitioners may have had. Subsequent to the trial in this case, the Court of Appeals for the Seventh Circuit decided in another case that probationary instructors were entitled to hearings upon contract nonrenewal. *Roth* v. *Board of Regents of State Colleges,* 446 F.2d 806 (7th Cir. 1971). On appeal in the instant case, the seventh circuit held that, in pre-*Roth* cases, a district court hearing satisfied the requirements of its decision in *Roth.* This Court recently reversed the *Roth* decision. *Board of Regents of State College* v. *Roth*, No. 71-162, 40 U.S.L.W. 5079 (U.S. June 29, 1972).

Prior to the hearing, respondents moved pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure for a class action determination with respect to the union which had purported to bring the action on behalf of all faculty members of the College, most of whom were not members of the union and only nine of whom, like petitioners, were probationary instructors not reemployed beyond the academic year 1970-71. The district court held that the union failed to satisfy its burden of showing that the prerequisites of a class action were met and the court of appeals agreed.

The judgment of the district court was unanimously affirmed in its entirety by the court of appeals on March 9, 1972.

REASONS FOR DENYING THE WRIT

As shown by the discussion which follows, none of the reasons meriting review on certiorari is presented by the instant petition. The only substantial federal question arguably presented has already been resolved by this Court in another case decided subsequent to the filing of the petition. The petition poses no question concerning which lower courts are in conflict or which involves a conflict with a decision of this Court.

I.

PETITIONERS' PRINCIPAL CONTENTION WAS RECENTLY REJECTED BY THIS COURT IN BOARD OF REGENTS v. ROTH.

The petition appears to contend that the principal issue in this case is whether probationary instructors who concededly have no state law right to reemployment nevertheless are entitled to a hearing prior to contract nonrenewal. This issue was raised by petitioners in a motion for summary judgment. However, the district court was not required to decide the issue because, at petitioners' instance, it held an expedited hearing at which, having heard the reasons for respondents' decision not to renew petitioners' contracts, the court found that the decision was not in retaliation for their exercise of first amendment rights.

Even though the court of appeals, subsequent to the trial, held in its decision in *Roth* v. *Board of Regents of State Colleges,* 446 F.2d 806 (7th Cir. 1972), that probationary instructors were entitled to hearings prior to contract nonrenewal, it agreed that there was no purpose to send the case back to the College for another hearing.

In any event, this Court in *Board of Regents of State Colleges* v. *Roth*, No. 71-162, 40 U.S.L.W. 5079 (U.S. June 29, 1972) held that a motion for summary judgment substantially identical to petitioners' motion should have been denied by the district court, stating "the respondent . . . did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." (Slip opinion at 13-14.) The right to reemployment of petitioners under the law of Illinois was identical to that of the teacher in *Roth, i.e.,* no ". . . state statute or University rule or policy . . . secured . . . [their] interest in re-employment or . . . created any legitimate claim to it." (Slip opinion at 13.)

Therefore, even if the district court had ruled on petitioners' motion for summary judgment, it would have been required to deny the motion.

II.

THERE IS NO NEED FOR THIS COURT TO REVIEW THE DISTRICT COURT'S FINDINGS OF FACT WHICH WERE UNANIMOUSLY UPHELD BY THE COURT OF APPEALS.

Unlike *Roth,* where no hearing had yet been held on the instructor's claim of denial of first amendment rights, in the instant case a hearing was held in the district court on these allegations. The hearing lasted four days. Petitioners called several witnesses in their behalf and testified themselves. Each individual respondent took the stand and was cross-examined by petitioners' counsel. The district court heard one-half day of oral argument. The district court found that petitioners had not shown by a preponderance of the evidence that respondents were in any way influenced by petitioners' union membership or speech activities.

The court of appeals reviewed the 839 page transcript and unanimously held that the district court's findings of fact were not clearly erroneous.

Another review by this Court is unnecessary.

III.

THE CLASS ACTION DETERMINATION DOES NOT RAISE ANY SUBSTANTIAL QUESTION.

There is no dispute that a voluntary organization such as the union may seek declaratory or injunctive relief in its own behalf in proper cases. Indeed, as petitioners point out at page 18 of the petition, the seventh circuit, which affirmed the dismissal of the union, has so indicated. *Adams* v. *City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961). See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). Petitioners point out that several circuits considering the issue are in agreement with the seventh circuit.

Here, however, the union did not sue on its own behalf. Instead, it sued as a class representative on behalf of all faculty members at the College, most of whom were not members of the union and only nine of whom were probationary instructors at the College whose contracts were not renewed beyond the academic year 1970-71. Clearly, none of the prerequisites of a class action under Rule 23(a) of the Federal Rules of Civil Procedure was met.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT E. JENNER, JR.
CHESTER T. KAMIN
RICHARD T. FRANCH
Attorneys for Respondents

Of counsel:
JENNER & BLOCK
135 S. LaSalle St.
Chicago, Ill. 60603
(312) 641-6060